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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958

No. 174

WILLIAM J. APLINGTON, as Administrator with the Will Annexed of the Estate of Walter Clerk, Deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

J. PAUL APLINGTON
105 Marquette Street
LaSalle, Illinois

FREDERICK W. IRION
Assistant State's Attorney
for LaSalle County, Illinois
505 Central Life Building
Ottawa, Illinois

Attorneys for Petitioner

CHICAGO LAW PRINTING CORP., 189 W. MADISON, CHICAGO FRanklin 2-6521

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Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable Justices of the Supreme Court of the United States:

Comes now William J. Aplington, as Administrator with the Will Annexed of the Estate of Walter Clark, deceased, by J. Paul Aplington, and Frederick W. Irion, Assistant State's Attorney for La Salle County, Illinois, his attorneys, and respectfully represents unto this Honorable Court as follows:

1. That this Petition is filed and presented for the purpose of reviewing the decision of the United States Court of Claims in its case No. 375-57, a copy of the opinion of said Court being hereunto appended.

2. That the opinion of said United States Court of Claims was rendered on January 14, 1959.

3. That petitioner's motion for rehearing in said Court was overruled on April 8, 1959.

4. That the statutory provision believed to confer jurisdiction on this Court to review said decision by Writ of Certiorari is contained in 28 U.S.C., Sec. 1255.

5. That the question presented for review is whether the three-year limitation period for filing claims for refund of estate taxes is applicable to a claim which could not accrue until *NINE MONTHS AFTER* the expiration of the limitation period. Or, conversely stated: *Can a statute of limitation be so applied as to rule a litigant out of court prior to the time when he could legally come into court?*

A second question involved concerns the applicability of the defense of the statute of limitations when such defense is urged against a governmental unit.

A third question concerns the propriety of the lower court's ruling in granting respondent's motion to dismiss the petitioner's petition when such motion was not filed within the time permitted by the rules of such court. (Transcript pages 30 to 32).

6. That the Federal statutes involved are as follows:

(*a*) Section 812 (d) of the Internal Revenue Code of 1939, as amended, exempts from Federal Estate Tax Liability transfers made to or for the use of any political subdivision of any State, the applicable language of said statute being in part as follows:

> "For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate * * *

(*d*) The amount of all bequests, legacies, devices, *or transfers* * * * *to or for the use of* the United States, any state, territory, *any political subdivision* thereof, or the District of Columbia, *for exclusively public purposes*[*] * * *" (emphasis added). (26 U.S.C., 1952 Ed., Sec. 812). (This provision was substantially re-enacted as Sec. 2055 (a) of the Internal Revenue Code of 1954; 26 U.S.C., 1955 Ed., Sec. 2055).

(*b*) Section 910 of the Internal Revenue Code of 1939, as amended, provides a period of limitation for the filing of claims for refund in the following language:

"All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioners within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund." (26 U.S.C., 1952 Ed., Sec. 910). (This provision now appears as Sec. 6511 (a) of the Internal Revenue Code of 1954 with no important changes insofar as the present case is concerned; 26 U.S.C., 1955 Ed., Sec. 6511).

7. That the statutes of the State of Illinois involved are as follows:

(*a*) "When there is no surviving spouse or known kindred of the decedent: the real estate escheats to the county in which it is located; the personal estate escheats to the county of which the decedent was a resident." (Ill. Rev. Stats., Chap. 3, (Probate Act) Sec. 162).

(*b*) "If any person shall die seized of any real or personal estate without any devise, and leaving no known heirs or representatives capable of inheriting

the same, or the devisees thereof be incapable of holding the same, and in all cases when there is no owner of real estate capable of holding the same, such estate, both real and personal, shall escheat as provided in the Probate Act." (Ill. Rev. Stats., Chap. 49, (Escheats Act) Sec. 1.).

(c) "When the State's Attorney of said county shall be informed or have reason to believe that any real estate within his county has escheated to said county by reason that any person has died seized thereof without devising the same, and leaving no heir capable of inheriting the same, or by reason of the incapacity of the devisee to hold the same, *and such estate shall not have been sold according to law within five years after the death of the person last seized, for the payments of the debts of the deceased,* or when he shall be informed, or has cause to believe that any such estate within his county has otherwise escheated to his county, it shall be his duty to file an information in behalf of the county in the Circuit Court of said county, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre tenants, and persons claiming such estate, if known, and the fact and circumstances in consequence of which such estate is claimed to have escheated, and alleging that by reason thereof said county has a right by law to such estate." (emphasis added). (Ill. Rev. Stats., Chap. 49, (Escheats Act) Sec. 3).

(d) "When there is insufficient personal estate to pay expenses of administration, claims against the estate, or legacies expressly or impliedly charged by the decedent's will upon his real estate, the executor or administrator by leave of the Probate Court and upon such terms as the court directs, may sell or mortgage for those purposes real estate or interest therein to which the decedent had claim or title; provided, after the expiration of seven (7) years from the date of death of a decedent, or after the expira-

tion of such additional time as may be allowed by the Probate Court for good cause shown upon petition filed by any interested party within said seven (7) year period or any extension thereof, no real estate, or interest therein, to which the decedent had claim or title, shall be sold or mortgaged for the purpose of paying expenses of administration or claims against the estate." (Ill. Rev. Stats., Chap. 3, (Probate Act) Sec. 379).

8. That a brief statement of the facts material to the consideration of this case is as follows: Walter Clark departed this life a resident of La Salle County, Illinois, on May 28, 1950; that on July 12, 1950, the petitioner herein was appointed Administrator with the Will Annexed of the estate of said decedent by the Probate Court of said County, and he has been at all times since then and yet is the duly qualified and acting Administrator with the Will Annexed of said estate; that on August 20, 1951, within 15 months after said decedent's death as is provided by law (Internal Revenue Code of 1939, Sec. 822), the petitioner herein filed with the Collector of Internal Revenue at Chicago, Illinois, a Federal Estate Tax Return for said estate and remitted the sum of $109,888.54, the same being the net estate tax payable according to said Return; that on August 1, 1952, said petitioner paid a deficiency assessment of $599.07, plus interest of $29.45; that on May 2, 1956, it having been then ascertained by said Administrator, petitioner herein, that he was unable to determine the heirship of said decedent and that, so far as said Administrator then knew, said decedent left him surviving no known heirs or representatives capable of inheriting his estate, an order of escheat was entered by the Probate Court of La Salle County, Illinois, directing said Administrator to transfer to the County Treasurer of

La Salle County, Illinois, for exclusively public purposes the personal assets remaining in this estate; that pursuant to said order of escheat said Administrator did deliver said personal assets remaining in this estate to the County Treasurer of La Salle County, Illinois.

That on December 3, 1956, a like order of escheat was entered in the Circuit Court of La Salle County, Illinois, on the information of said County of La Salle filed by Harland D. Warren, State's Attorney for said County, vesting title in said County of La Salle to the real estate owned by said decedent at the time of his death; that true and exact copies of each of said orders of escheat are included in the transcript of record filed herewith at pages 5 to 14.

That on June 12, 1956, said petitioner filed a claim for refund of the $109,888.54 original Federal Estate Tax paid by him in this estate with the District Director of Internal Revenue at Chicago, Illinois, said claim for refund being predicated upon the order of escheat entered on May 2, 1956, by the Probate Court of La Salle County, Illinois; that both the District Director of Internal Revenue at Chicago, Illinois, (by letter dated September 10, 1956) and the Chicago Regional Appellate Division (by a letter dated February 12, 1957) denied petitioner's claim for refund of said tax; that true and exact copies of each of said letters are hereunto appended.

That on August 15, 1957, petitioner filed in the United States Court of Claims his Petition for refund of said $109,888.54 original Federal Estate Tax paid by him; that respondent's answer to said petition was filed on October 3, 1957; respondent's motion to dismiss said petitioner's petition was filed on July 30, 1958; petitioner's

motion to strike respondent's motion to dismiss was filed on September 29, 1958; the opinion of the Court was entered on January 14, 1959, dismissing said petitioner's petition on respondent's motion to dismiss; and petitioner's motion for rehearing filed February 12, 1959, was overruled by said Court on April 8, 1959.

That the United States Court of Claims had jurisdiction of this case as the Petition was filed in said Court within 6 years after the claim for refund first accrued. (28 U.S.C. Sec. 262).

9. That petitioner verily believes that a Writ of Certiorari should be allowed in this case for the following reasons;

(*a*) By the decisions of the District Director of Internal Revenue, the Chicago Regional Appellate Division and the United States Court of Claims petitioner has been placed in the anomalous situation of being required to pay a Federal Estate Tax and to file a claim for refund thereof within a period of time which is inconsistent with the time provisions of the Illinois Escheats Act. Should the petitioner have failed or neglected to file a Federal Estate Tax Return or to have paid the tax shown to have been due thereon within 15 months after decedent's death, at which time the heirship of said decedent had not been determined, he could have been subjected to personal liability for the payment of such tax, together with interest and penalties. Decedent died on May 28, 1950. The Federal Estate Tax was paid on August 20, 1951, or prior to the due date of August 28, 1951, 15 months after the date of death. On August 20, 1954, this being 3 years after the payment of said tax, petitioners did not know that the estate of said decedent would escheat to the County of

La Salle, Illinois, for lack of heirs. He could not file a claim for refund by August 20, 1954, without such knowledge. It was not until the order of escheat was entered by the Probate Court of La Salle County, Illinois, on May 2, 1956, that it was judicially determined that there were no heirs capable of inheriting said estate and the personal property was ordered to escheat to the County of La Salle. It should be noted that the petitioner took prompt action in filing his claim for refund approximately 6 weeks after the order of escheat had been entered.

Under the Escheats Act of the State of Illinois, quoted above, it is respectfully submitted that the real estate owned by said decedent at the time of his death could not escheat to the County of La Salle until more than 5 years after the death of the decedent.

Petitioner respectfully submits that the interpretation by the Court of Claims of the Federal Statutes, when considered with the *five year* Illinois period for escheats, necessarily requires payment, and precludes refund, of estate taxes in every case of escheat arising out of the State of Illinois. This interpretation by the Court of Claims renders completely inoperable the deduction authorized in Section 812. (d) of the Internal Revenue Code of 1939, and the corresponding provision of the 1954 Code, as applied to escheated property; that by reason of such interpretation petitioner was placed in the incongruous position of being obliged (at the risk of incurring great personal liability if he did not do so) to file a Return and pay the tax within 15 months after the death of decedent and to file a claim for refund within 3 years after payment of such tax (a maximum period of 51 months after the death of decedent), and yet, by State law there could be no effective escheat until 5 years (or 60 months) after the death of decedent.

It is respectfully submitted that any claim for refund filed prior to the entry of an order of escheat would have been premature as the claim for refund in this case is predicated solely on the fact that said estate has now escheated to La Salle County, Illinois.

It is further respectfully submitted that under these circumstances the defense of the statute of limitations for the filing of the claim for refund should be denied. (See 36 C.J.S. Federal Courts, Sec. 343).

(*b*) Petitioner further respectfully submits that it is a fundamental and cardinal rule of law that the statute of limitations does not run against the government or against a political subdivision thereof. By virtue of the orders of escheat entered in the Probate Court of La Salle County, Illinois, on May 2, 1956, and in the Circuit Court of La Salle County, Illinois, on December 3, 1956, as aforesaid, the entire estate of said decedent is now vested in the County of La Salle, Illinois, a political subdivision and a governmental unit in the State of Illinois. To allow the defense of the statute of limitations to be urged to the filing of the claim for refund in this case would be tantamount to the granting of the defense of the statute of limitations as against a governmental body. This would be contrary to the rule of law above mentioned which forbids the establishment of this defense against a governmental unit. For this additional reason the defense of the statute of limitations should be denied. (See 53 C.J.S. Limitations of Actions, Sec. 17).

(*c*) The lower Court based its opinion strictly and solely on the technical grounds of upholding the defense of the statute of limitations. Attention is called to the fact that the lower Court in its opinion did not once refer to the fact of escheat or to applicable provisions of the Illinois Statutes relating thereto. It is respectfully sub-

mitted that the lower Court overlooked this fact in reaching its decision in this case.

(*d*) The opinion of the lower Court was improperly entered on respondent's motion to dismiss said petitioner's petition rather than on the issues presented by the petition and the answer. As is indicated above, said petitioner's petition was filed in the lower Court on August 15, 1957, and respondent's answer thereto was filed on October 3, 1957. Issue was thus joined. Nearly 11 months later on July 30, 1958, respondent filed its motion to dismiss said petitioner's petition. Petitioner filed a motion to strike said respondent's motion to dismiss on September 29, 1958. The granting by the lower Court of respondent's motion to dismiss said petitioner's petition was improper and contrary to the rules of said Court. Rules 16 (a) and 16 (b) of said Court, so far as applicable, provide as follows:

> "(*a*) Time for Answer and Reply: Except as otherwise provided in these rules, the United States shall file its answer within 60 days after the service of the petition. * * *
>
> "(*b*) How Presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed within 30 days after service of the pleadings to which the motion is directed and shall be filed before further pleading if a further pleading is permitted. * * *"

Petitioner respectfully submits to the Court that since the matters alleged in respondent's motion to dismiss said petitioner's petition were not contained in the answer of

the respondent to said petition; and since the motion of the respondent to dismiss said petitioner's petition is predicated upon either the alleged failure of the petitioner to confer jurisdiction on said Court or upon the alleged failure of said petitioner's petition to state a claim upon which relief can be granted, and such defense was not filed within 30 days after service of said petitioner's petition on the respondent, the respondent's motion to dismiss was not filed in apt time and was not filed within the time permitted by the rules of said Court. For these reasons the lower Court should have granted petitioner's motion to strike respondent's motion to dismiss and should have proceeded with a determination and adjudication of this case on the issues established by the petition and answer.

10. That petitioner has no appeal from said decision of the United States Court of Claims, nor has he any adequate remedy in the premises other than for a petition for issuance of a Writ of Certiorari herein.

Wherefore, petitioner respectfully prays that a Writ of Certiorari may be issued herein forthwith by the Clerk and under the seal of this Court, to bring up a certified transcript of the record in this case including therein all proceedings, pleadings, findings of fact, conclusions of law, judgment, orders, opinions of the Court and all other documents and items pertaining to this case, that the same may be reviewed by this Court.

WILLIAM J. APLINGTON, as Administrator with the Will Annexed of the Estate of Walter Clark, Deceased.

J. PAUL APLINGTON
FREDERICK W. IRION
Assistant State's Attorney for
La Salle County, Illinois
Attorneys for Petitioner

STATE OF ILLINOIS)
COUNTY OF LA SALLE) ss.

J. Paul Aplington, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition for a Writ of Certiorari; that he has read said petition and knows the contents thereof; that the matters and things set forth therein are true in substance and in fact of his own knowledge.

/s/ *J. Paul Aplington*

Subscribed and sworn to before me this 23rd day of June, 1959.

(SEAL) /s/ *Fremont M. Kaufman*
Notary Public

Respectfully submitted,

J. PAUL APLINGTON
105 Marquette Street
LaSalle, Illinois
FREDERICK W. IRION
Assistant State's Attorney for
LaSalle County, Illinois
505 Central Life Building
Ottawa, Illinois
Attorneys for Petitioner

No. 375-57

(Decided January 14, 1959)

WILLIAM J. APLINGTON, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF WALTER CLARK, DECEASED, v. THE UNITED STATES

Mr. David McNeilly for the plaintiff.

Mr. H. S. Fessenden, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for the defendant. *Messrs. James P. Garland* and *Lyle M. Turner* were on the brief.

On Defendant's Motion to Dismiss Plaintiff's Petition

JONES, *Chief Judge*, delivered the opinion of the court:

This is a suit by the plaintiff as administrator of the estate of Walter Clark, deceased, for a refund of a Federal estate tax.

The primary question is whether a claim for refund was filed within the statutory period as provided in section 910 of the Internal Revenue Code of 1939 as a requirement for maintaining suit.

Walter Clark died on May 28, 1950. Pursuant to the provisions of his will the plaintiff was appointed administrator by the Probate Court of LaSalle County, Illinois, on July 12, 1950.

The administrator filed a Federal estate tax return on August 20, 1951, and paid thereon the estate tax in the sum of $109,888.54 to the Internal Revenue Collector at Chicago, Illinois. A small deficiency tax of $599.07 and interest in the sum of $29.45 was assessed and paid. A claim for refund of the $109,888.54 was filed on June 12, 1956. The

plaintiff was notified on February 12, 1957, that the claim for refund of the Federal estate tax was disallowed.

Section 7422 (a) of the Internal Revenue Code of 1954[1] contains a provision to the effect that no suit or proceeding may be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund or credit had been duly filed according to provisions of law and the regulations issued pursuant thereto.

Section 910 of the Internal Revenue Code of 1939[2] contained the provisions of law in regard to the filing of claims for refund that were in effect prior to the enactment of the 1954 Code. This section is to the effect that a claim must be filed within three years after the payment of the tax.

---

[1] Internal Revenue Code of 1954:

Sec. 7422. Civil Actions For Refund.

(a) **No suit prior to filing claim for refund.**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate, in pursuance thereof. [28 U. S. C. (1952 ed., Supp. II) § 7422.]

[2] Internal Revenue Code of 1939:

§ 910. **Period of Limitation for Filing Claims.**—"All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund." (26 U. S. C. 1952 ed., sec. 910.)

The pleadings show, and the parties are in agreement, that the tax was paid on August 20, 1951, and the deficiency on August 21, 1952. The petition alleges that the claim for refund was filed on June 8, 1956. The defendant asserts that the date was June 12, 1956. In any event it is clear that it was filed in June of 1956. Thus more than three years elapsed between the payment of the tax and the filing of the claim for refund.

It has been repeatedly held that the filing of a timely claim for refund is essential to the maintenance of a suit for such refund and that it is not within the province of a court to read out of the statute the specific requirements of the law. *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269 (1931); *United States* v. *Garbutt Oil Co.*, 302 U.S. 528 (1938); *Wisconsin National Life Insurance Co.* v. *United States*, 70 C. Cls. 433 (1930); *Central Iron & Steel Co.* v. *United States*, 79 C. Cls. 56 (1934).

We quote from the opinion in *United States* v. *Felt & Tarrant Co.*, *supra*, at page 272:

> The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. [Citing cases.]

In order to justify a recovery it must affirmatively appear that these specific provisions of the law have been complied with. Not only does the record not affirmatively show that the requirements for the maintaining of a suit have been met, but on the contrary the dates set out in the pe-

tition clearly demonstrate that more than three years elapsed between the time of payment of the estate tax and the filing of a claim for refund.

The requirements of the statute and the regulations issued pursuant thereto not having been complied with, the court has no choice other than to dismiss the suit for failure to comply with the provisions that have been established by law. Accordingly, defendant's motion is granted and the petition will be dismissed.

It is so ordered.

FAHY, *Circuit Judge*, sitting by designation; LARAMORE, *Judge*; MADDEN, *Judge*, and WHITAKER, *Judge* concur.

Form 1203
Estate and Gift Tax

U. S. TREASURY DEPARTMENT
OFFICE OF DIRECTOR OF INTERNAL REVENUE
17 N. Dearborn Street
Chicago 2, Illinois

September 10, 1956

INTERNAL REVENUE SERVICE
In replying refer to:
AUD:FA:WJC
De 2-4500 Ex 265
Mr. William J. Aplington, administrator of
the estate of Walter Clark
c/o McNeilly and Ryan, Attorneys
1800½ Fourth Street
Peru, Illinois

Dear Mr. Aplington:

The examination by this office of the Estate tax return of the above-named estate, in connection with your claim for refund of $109,888.54, discloses no grounds for reduction of the tax liability of the estate.

IF YOU AGREE to these conclusions, please so advise this office at your earliest convenience.

IF YOU DO NOT AGREE to these conclusions, you may file a protest, executed in triplicate undereoath, with this office, within thirty-days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration, and, if you so request, an opportunity for a hearing in this office will be granted you.

Should you fail to file with this office within the thirty-day period mentioned, either an acceptance of these conclusions or a written protest, a recommendation will be made to the Regional Commissioner of Internal Revenue that your claim be disallowed.

Your prompt acknowledgment of the receipt of this letter, upon the enclosed form will be much appreciated.

IMPORTANT: It is essential that communications transmitting protests or agreements relative to this letter be addressed to the (address shown above), (Dist. Director of Internal Revenue, Chief, Audit Division, 17 North Dearborn Street, Chicago 2, Illinois).

Very truly yours,
/s/ H. Alan Long
District Director

ats
/s/ WJC
Enclosure:
Form of acknowledgment

February 18, 1957

ARC-Ap:CHI
Chi:RYE:JOA

Mr. William J. Aplington
Administrator with the will annexed
Estate of Walter Clark
105 Marquette Street
LaSalle, Illinois

Dear Sir:

This refers to the claim for refund of estate tax in the amount of $109,888.54 filed for the above-named estate.

The claim will be disallowed in full.

Section 910 of the Internal Revenue Code of 1939 prohibits the allowance of a refund after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed. The records disclose that the original tax of $109,888.54 was paid on August 20, 1951 and the deficiency in tax of $569.62 was paid on August 21, 1952. Your claim was filed with the District Director of Internal Revenue at Chicago, Illinois on June 12, 1956. The claim, therefore, was not filed within the limitation prescribed by law.

Furthermore, even if the claim had been timely filed, it would not be allowable for the reason that the order of Escheat entered by the Probate Court of LaSalle County, Illinois, does not constitute a transfer within the meaning of Section 812(d), Internal Revenue Code of 1939.

The statutory notice of the disallowance of the claim will be forwarded to you at a later date by registered mail, in accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code.

A carbon copy of this letter has been mailed to your representatives, Messrs. Howard C. Ryan and David McNeilly, 1800 Fourth Street, Peru, Illinois, in accordance with the powers of attorney executed by you and on file with the Service.

Very truly yours,

/s/ Wallace T. Morris
Associate Chief
Appellate Division,
Chicago Region

JOA:cm
1/3/57

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United States v. *Felt & Tarrant Co.*, 283 U.S. 269 — 3

United States v. *Garbutt Oil Co.*, 302 U.S. 528 — 3

Statutes:

Internal Revenue Code of 1939:

Sec. 812 (26 U.S.C., 1952 ed., Sec. 812) — 2, 4, 7

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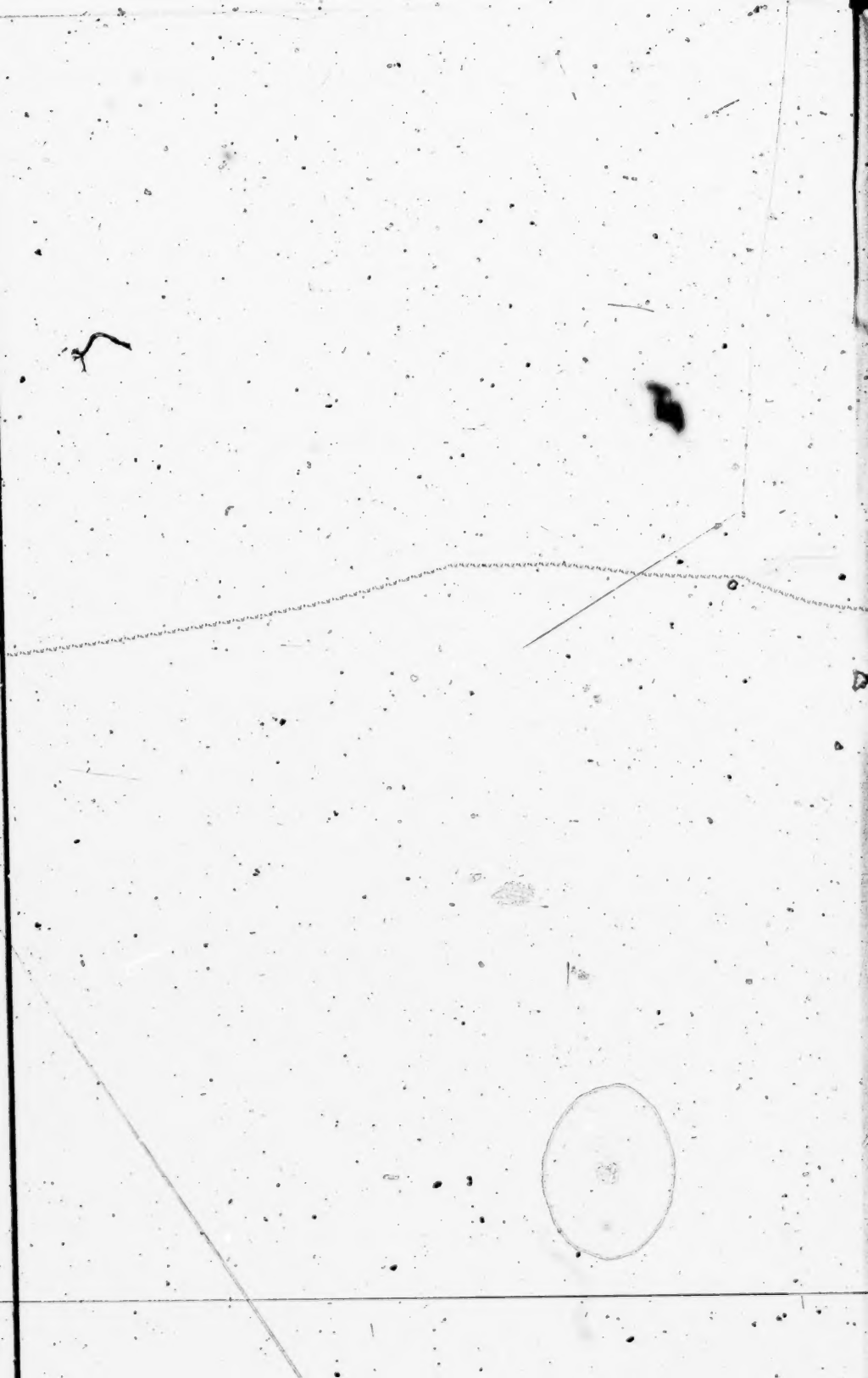

In the Supreme Court of the United States

October Term, 1959

No. 174

WILLIAM J. APLINGTON, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF WALTER CLARK, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 169 F. Supp. 815. (Pet. 13-16.)

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959 (Pet. 13-16), and a motion for rehearing was denied on April 8, 1959. The petition for certiorari was filed on July 2, 1959. The jurisdic-

tion of this Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Whether the court below properly dismissed the petitioner's suit for refund of estate tax paid on the ground that the claim for refund was not filed within the statutory period of limitations prescribed in Section 910 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix.

STATEMENT

The decedent, Walter Clark, died on May 28, 1950. The plaintiff below, William J. Aplington (the taxpayer), was appointed administrator of decedent's will on July 12, 1950. On August 20, 1951, the taxpayer filed an estate tax return and paid the tax shown thereon in the amount of $109,888.54. A claim for refund of this amount was filed on June 12, 1956, on the ground that the decedent's estate had escheated to LaSalle County, Illinois, under orders of the probate court of that county. The claim was disallowed by the Commissioner of Internal Revenue for the reason that it was not filed within the three-year period of limitations prescribed in Section 910 of the Internal Revenue Code of 1939, and for the further reason that the escheat did not constitute a transfer of decedent's property within the meaning of the deduction provisions of Section 812(d). This suit for refund followed. (Pet. 13-14, 19.)

The Court of Claims granted the motion of the United States to dismiss on the ground that the refund claim had not been timely filed. (Pet. 13-16.)

ARGUMENT

The decision below is correct and there is no conflict of decisions or other reason warranting review.

1. Section 7422(a) of the Internal Revenue Code of 1954, Appendix, *infra*, p. 8, provides that a suit to recover taxes paid cannot be maintained in any court until a claim for refund has been duly filed. Section 910 of the Internal Revenue Code of 1939, Appendix, *infra*, p. 7, provides that claims for refund of federal estate taxes must be filed within three years after payment. It is settled that the Commissioner is without power to consider an untimely claim for refund (*United States* v. *Garbutt Oil Co*, 302 U.S. 528), and that in the absence of a timely claim a suit to recover taxes may not be maintained (*United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 272).

The refund claim on which the instant suit is founded concededly was not filed within the three-year period of limitations prescribed in Section 910. The tax was paid in 1951, and the claim was not filed until 1956. (Pet. 13-14.) This statutory condition precedent not having been met, the court below properly held (Pet. 16) that it had "no choice other than to dismiss the suit for failure to comply with the provisions that have been established by law."

2. The taxpayer's contentions are without merit.

(a) The contention (Pet. 9) that the statute of limitations embodied in Section 910 of the Internal

Revenue Code of 1939 does not apply to the State of Illinois, to which the decedent's property escheated, misconceives the issue. The federal estate tax is imposed upon the decedent's estate, not upon those who receive the residue remaining after payment of taxes and other debts. It is the party who pays and sues to recover the federal tax (here, the administrator of the estate) against whom the statute of limitations runs.

(b) Equally without merit is taxpayer's contention (Pet. 7-9) that he was precluded by the Illinois escheat statutes from filing a timely claim for refund of the federal estate tax. To begin with, the contention rests on the premise that the escheat constituted a "transfer" of decedent's property within the meaning of the deduction provisions of Section 812(d) of the Internal Revenue Code of 1939, Appendix *infra*, p. 7, an assumption which the Commissioner rejected in disallowing the refund claim on the merits.[1] (Pet. 19.) The contention rests on the additional unwarranted assumption that the three-year limitations period prescribed in the federal taxing statute was tolled, on the theory that the decedent's property did not finally escheat to the State under Illinois law until the lapse of five years from his death, and that until the formal entry of the escheat orders by the state probate court the claimed right to the deduction did not accrue. Nothing in the governing federal statutes or decisions justifies the taxpayer's assump-

[1] The court below refrained from passing on the merits of the refund claim in view of the taxpayer's failure to file a timely claim.

tion that the limitations period fixed by Congress for filing federal tax refund claims may be extended (or circumscribed) by local law. Moreover, there was nothing to prevent the taxpayer from filing a protective refund claim prior to the expiration of the three-year limitations period; indeed, the refund claim was in fact filed before entry of the second escheat order, but after the three-year limitations period had expired.[2]

(c) Nor is there substance in taxpayer's contention (Pet. 10-11) that the court below disregarded its own rules in entertaining a motion to dismiss filed more than thirty days after service of the petition below. The requirement that a refund claim be timely filed prior to the bringing of an action for refund is jurisdictional in nature. *United States* v. *Felt & Tarrant Co., supra.* It has long been settled that the question of jurisdiction may be raised at any time during the proceedings. See, e.g., *M.C. & L. M. Railway Co.* v. *Swan*, 111 U.S. 379. Rule 16(h) of the court below expressly recognizes this established principle,[3] and the dismissal by it of the refund suit was clearly in accord with that principle and its own rules.

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[2] The refund claim was filed on June 12, 1956, which was several months prior to entry of the second escheat order of December 3, 1956, covering all of the decedent's real property. (Pet. 5-6.) No reason appears for taxpayer's failure to file the claim sufficiently in advance to meet the requirement of the statute of limitations.

[3] Rule 16(h), to which no reference is made by taxpayer, provides that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(d) [as amended by Sec. 408(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 511(a), Revenue Act of 1943, c. 63, 58 Stat. 21] *Transfers for Public, Charitable, and Religious Uses.* —The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SEC. 910. PERIOD OF LIMITATION FOR FILING CLAIMS.

All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years

next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

(26 U.S.C. 1952 ed., Sec. 910.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.* —No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7422.)

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